UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 23-cr-80101-AMC

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD J. TRUMP, WALTINE NAUTA, CARLOS DE OLIVEIRA,

Defendants.

Fort Pierce, Florida

April 12, 2024

2:03 p.m. - 4:06 p.m.

Pages 1 to 108

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

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STENOGRAPHICALLY REPORTED BY:

LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter to the
Honorable Aileen M. Cannon
United States District Court
Fort Pierce, Florida

(Call to the Order of the Court.)

THE COURT: Good afternoon. Please call the case. And you may all be seated unless you're addressing the Court.

COURTROOM DEPUTY: United States of America vs. Donald J. Trump, Waltine Nauta, and Carlos De Oliveira. Case Number 23-cr-80101.

Will parties please make your appearance, starting with the government.

MR. BRATT: Good afternoon, Your Honor. Jay Bratt and David Harbach on behalf of the United States.

THE COURT: Good afternoon.

MR. FIELDS: Good afternoon, Your Honor. Lazaro Fields on behalf of President Trump.

THE COURT: Who is here for Mr. Nauta?

MR. WOODWARD: Good morning, Your Honor -- good afternoon, Your Honor. Stanley Woodard and Sasha Dadan for Mr. Nauta.

THE COURT: Good afternoon to you. And good afternoon to you, Mr. Nauta.

Who is here for Mr. De Oliveira?

MR. IRVING: Good afternoon, Your Honor. John Irving and Donnie Murrell for Mr. De Oliveira.

THE COURT: Good afternoon to you both. And good afternoon to you, Mr. De Oliveira.

MR. DE OLIVEIRA: Thank you.

THE COURT: All right. Before we get started, as usual, I will remind the parties that possession or use of electronic equipment in the courtroom, except as authorized for counsel -- and Mr. Woodward, I'm going to ask that you stop fiddling with your phone -- is strictly prohibited; that includes any broadcasting, photographing, recording, or filming of any kind. Obviously, we have, as usual, set up our second-floor overflow room, and there should be no attempt to circumvent any of these rules in that overflow room either.

Also, I would ask that everybody remain seated throughout the duration of the hearing so as to avoid interruption.

With that, we have set for hearing this afternoon, three motions. In the following order: First, Defendant De Oliveira's motion to dismiss the superseding indictment, or alternatively, for a bill of particulars. That motion is docketed at entry 323. There is a response in opposition filed by the Special Counsel at docket entry 372, and there is a reply in support of a motion at docket entry 413.

I'm going to start off with that motion today, just so you all can prepare in terms of sequence.

Then next up, we have Defendant Nauta's motion for a bill of particulars; that has now been docketed at entry 446, with the reply filed at 447. And there is an opposition at 380.

And finally, Defendant Nauta's motion to dismiss Counts 33, 34, 35, 40, and 41, in the superseding indictment, based on the meaning of the term "corruptly" in Section 1512(c); that has now been docketed at entry 448, with the reply at 449, and an opposition at 379.

All of these filings are now publicly filed with the exception of one exhibit which is the full transcript of Mr. Nauta's grand jury testimony. And I asked the parties to be prepared to discuss what to do about continued sealing of that transcript.

So with that, I will add that I have reviewed all of the motions and the related papers. I'm prepared to hear argument. And because these are all defense-brought motions, I will start, of course, with defense counsel and, as indicated, with Mr. De Oliveira's motion.

Who will be taking the lead on that motion?

MR. IRVING: I will go ahead and do that, Your Honor.

THE COURT: Okay. And if you could present argument from the lectern, please.

MR. IRVING: Of course.

Good afternoon, Your Honor.

So I have been scratching my head about this indictment for quite some time. And it's -- it's a welcome opportunity to finally be able to discuss some of this.

But it -- this -- in -- the superseding indictment is

53 pages of square peg in a round hole that fails to allege even on its face -- and I understand that we have to deal with the four corners of the indictment. I'm not suggesting that this is an evidence suppression motion or a Rule 29 motion or anything like that further down the road. I get it. But even taken on its face, it fails to allege that Mr. De Oliveira committed any crime. It fails to allege that he had any idea that any of these boxes in question contained classified documents; I think the government's conceded that, if I'm -- if my reading of their prior filings is correct.

It accuses him of conspiring to prevent Trump Attorney 1 from seeing precisely the documents that he and Mr. Nauta allegedly moved into the storage room, which makes no sense, why he would -- I mean, that's a funny way to hide something from Trump Attorney 1, is to move a bunch of boxes into a storage room that he then immediately reviews.

It fails to allege that Mr. De Oliveira had any idea that there were subpoenas issued for the -- for classified documents at first, or then for CCTV -- security footage of Mar-a-Lago --

THE COURT: What is your understanding of the level of specificity that is required in the case law to allege knowledge of an official proceeding?

MR. IRVING: I think, Your Honor, that it needs to -- obviously, tracking the statutory language, and I

don't -- I'm not arguing that it doesn't do that. But when -- but the case law discussed in the -- in the pleadings indicates that there has to be some factual predicate for that in -- in the indictment itself. And here I would argue, frankly, that it's almost worse than an indictment that simply tracks the factual pleadings -- or the statutory language.

It would be like having an indictment of a -- people like to talk about the -- you know, a get-away driver being, you know, criminally liable for the acts of his bank-robbing co-conspirators. Fine. You know?

But this would be like having an indictment where the get-away driver is charged as a co-conspirator. And then the language talks about how he was an Uber driver, had never met the people who robbed the bank before, and had no idea what they had just done. I mean, that couldn't possibly make any sense in the indictment. And although this one is quite verbose, at 53 pages, it doesn't -- it's quantity over quality, and it doesn't -- it says nowhere anything about informing the corrupt criminal intent, or the knowing agreement that he is required to -- to have to conspire.

THE COURT: Well, it alleges in Count 33 that he engaged in a conspiracy and that he acted with corrupt intent; does it not?

MR. IRVING: It says that. And that's the tracking of the statutory language, but then when -- it incorporates all of

the facts that are, you know, alleged in the earlier paragraphs, pages. And nowhere in there does it explain that -- does it offer any evidence or -- or even argument or -- on its face that he was aware of a subpoena.

So it's like conspiring to go to the grocery store. I mean, if he doesn't -- if he is not aware of any kind of criminal intent, even assuming on the four corners of the indictment, obviously, that, you know -- obviously, these are all contested facts, but this isn't the time and place for that; I get that. But, you know, although it tracks the statutory language, like I said before, it's almost worse than simply tracking the statutory language. It tracks the statutory language and then provides facts that don't support what it then says in the tracking of the statutory language.

THE COURT: Well, so I'm looking at Count 33. It has a series of phrases citing provisions in 1512, of course, with that corrupt language. And then it has paragraph 96, which states that the purpose of the conspiracy was for Trump to keep classified documents he had taken with him from the White House and to hide and conceal them from a federal grand jury.

It then sets forth the means and manner of the conspiracy, offering A through G, all with a final citation to Section 1512(k). So I guess, what exactly, if you could pinpoint, is missing, in your view?

MR. IRVING: Well, in my view, for starters, the manner

and means of the conspiracy that you point out, Your Honor, in paragraph 97 has a, you know, fairly long list of items. It's -- it's unclear to us, and I think ought to be, at a minimum, the subject of a bill of particulars as to which of these the government is alleging Mr. De Oliveira engaged in.

Obviously, the last one, G, you know, is reflected in Counts 40 and 41. But the making of false statements -- I don't want to get surprised at trial that somehow the making of the false statements, in a time period that's well beyond the time period of the conspiracy, is somehow an act in furtherance of the conspiracy; I think the government needs to explain that.

You know, I want to make sure that, you know, that they're not arguing and don't intend to argue that the moving of the boxes as referenced in, you know, item (b) at least, you know, had anything to do with Mr. De Oliveira.

THE COURT: So, to your understanding at this point, although I know you have indicated you're seeking more clarity, it appears that only Subsection (g) of the manner and means of Count 33, at least, implicates Mr. De Oliveira?

MR. IRVING: Well, it reflects -- no, I wouldn't say that, Your Honor. I -- I -- I don't want to play games either, right? I mean, it's obviously what -- what's reflected in Counts 40 and 41. But those counts, and this language here, also totally fails to suggest even, that Mr. De Oliveira had

any idea that there was an investigation, had any idea that there was a subpoena. And Counts 40 and 41 discuss more -- in more detail what was actually happening, and being -- and what the colloquy was between Mr. De Oliveira and witness number whatever -- I can't remember at this point -- where he allegedly asked how the video system worked, how long video was stored for, and then stated that the boss wants it deleted (indicating). Right?

So, first of all, none of those are requests or demands. And it wouldn't be criminal in any event, absent some sort of knowledge that there was a subpoena or that this -- that -- it's impossible to obstruct an investigation you know nothing about. So --

THE COURT: Okay. So I think what I have heard is that it's missing, in your view, an allegation that Mr. De Oliveira knew of an official proceeding?

MR. IRVING: Counts 40 and -- 40 and 41 are missing that. And then by -- if that's all getting wrapped up into Count 33, it suffers the same infirmity. There are no facts alleged that would -- that could possibly support the required corrupt and knowing -- corrupt mens rea and knowing agreement. It's just simply not there.

THE COURT: But, again, just looking through the list of (a) through (g), what is your understanding of which of those letters applies to Mr. De Oliveira, understanding, of

course, that conspirators don't need to be involved in each and every component of the conspiracy?

MR. IRVING: No, they don't, Your Honor. But they do need to have the proper mens rea, and they need to knowingly agree with the object of the conspiracy, which also makes no sense.

But to answer the Court's question, I -- I mean, probably a better question for the government, but I am assuming that the government believes that subparagraph (g), attempting to delete security camera footage from the Mar-a-Lago Club to conceal the footage from the FBI and the grand jury, would -- would apply to Mr. De Oliveira.

But, again, you know, it's the -- it's the -- "to conceal the footage from the FBI and the grand jury" that -- none of the factual discussion in this 53 pages of rambling superseding indictment says anything about Mr. De Oliveira's understanding that anything was ever going to be submitted to either the FBI or the grand jury, or had been subpoenaed or that there was an investigation at all.

And I think if they had those facts, they certainly would have put them in here.

THE COURT: So just with respect to your request for a bill of particulars, if the Court were to entertain that request -- and, again, it's still up for discussion --

MR. IRVING: Sure.

THE COURT: -- what specific allegation with respect to mens rea do you think would be necessary for you to have sufficient information to prepare a defense?

MR. IRVING: I would like to know, what is their -- what are they alleging Mr. De Oliveira did or said that reflects any knowledge on his -- or anybody else that reflects any knowledge on his part that there was anything to obstruct in the first place?

THE COURT: Okay. Anything further you wish to add on Count 33?

MR. IRVING: No, Your Honor. I'm happy to proceed to -- I think we've already talked about 40 and 41, but I would be happy to answer any questions on those. I was going to move to the false statements.

THE COURT: What's your understanding of the difference between Count 40 and Count 41, factually?

MR. IRVING: I'm not sure -- I'm not sure I -- I --

THE COURT: So just looking at the language in Count 40 --

MR. IRVING: Right.

THE COURT: -- versus the language in Count 41, one refers to knowing -- knowingly corruptly persuading another person to conceal an object with intent to impair the object's integrity and availability for use in an official proceeding. And then it refers to a request by all three individuals made

to Trump Employee 4 to delete security camera footage.

And then Count 41 refers to those same three individuals requesting that the same employee delete security camera footage. I'm just trying to understand -- and I will ask the Special Counsel if they can just clarify the coverage for each of these counts as they overlap potentially.

MR. IRVING: Yeah, I -- I mean, I -- again, that's probably a better question for them. But I -- as a practical matter, I don't see much difference between the two. I realize that, obviously, one is pleading the language of (b)(2)(B) and the other is pleading the language of (c)(1).

You know, one talks about persuading and attempting to persuade. The other talks about actually doing, altering, destroying, blah-blah-blah, concealing. So --

THE COURT: Okay. All right.

Now, then, getting to the 1001.

MR. IRVING: Right.

THE COURT: You have indicated that you don't have enough specificity to understand what the alleged false statement is. Can you elaborate on your argument?

Because the indictment does contain a substantial excerpt from the recorded interview with -- underlined in bold, and then a subsequent paragraph 120.

MR. IRVING: Yes, Your Honor.

So, first of all, the indictment leaves out a section

of that colloquy that includes some explanation as -- in the public setting. I'm not going to get into it, but --

THE COURT: You have the full recorded transcript?

MR. IRVING: I have that excerpt here.

THE COURT: No. But in discovery, have you been provided with a copy -- a full copy of the recorded interview?

MR. IRVING: Oh, yes.

THE COURT: Okay. Please continue.

MR. IRVING: So it -- it leaves that out. It doesn't address Mr. De Oliveira's direct answers to questions about the actual boxes and things that they were asking him about that are the subject of all of this.

And then it -- you know, there is this rambling, you know -- I -- I quoted in the -- you know, in the pleading it essentially says -- these are questions about boxes that arrived at Mar-a-Lago. "Do you -- were you -- do you even -- like, or were you even there or aware of boxes that, like, all the stuff was moved in? Even, like, his personal stuff, his clothes, furniture, nothing" -- I mean, it doesn't make any -- and regardless of what his answers to those questions were, it's hard to imagine what possible relevance that might have had to an investigation two years later about boxes that the government has explained have been moved repeatedly, which brings us to the magic box problem, but I'm not sure if the Court wants me to get into that, where you have

64 boxes being moved out and 30 being moved back in, and 75 being, you know, identified later during the search warrant.

I mean, there is plenty of weird going on here, but --

THE COURT: Well, I'm not familiar with the magic box problem. I don't know if it's been briefed that way.

But in any case, let's just take this in an organized fashion. Number 1 --

MR. IRVING: Sure.

THE COURT: -- why do you believe there is insufficient specificity as to what particular alleged false statements are the subject of Count 42?

MR. IRVING: Well, I'm taking the position, Your Honor, that nothing in here is a lie. So if there's --

THE COURT: So why wouldn't that just be a trial argument?

MR. IRVING: Because on its face, the indictment is not alleging that he -- that he, A, said anything that was false, and B, how -- how that could have possibly been material.

I mean, this is -- this is broken, you know, babbling question and answer about -- and it's -- again, Your Honor, it's the government's obligation. It's the FBI's obligation to nail him down and make sure that we all understand what boxes we're talking about; right? We understand what we're talking about.

We're not talking about, you know, "personal stuff and,

like, clothes and, like, you know, furniture." You know, I mean -- if that was going to be the basis for a 1001 charge, they had the obligation to nail him down. It's not Mr. De Oliveira's obligation to figure out what they're trying to ask him.

So I would take the position, Your Honor, that the count simply fails to state a 1001 violation. And if there is something I'm missing, that, I guess -- some other language that's not in the transcript or elsewhere about this, that would add up to a false statement that is material, I would be happy to answer.

THE COURT: Okay. So I think we've talked about the -- the specificity of the statements. But what is your argument on materiality? Because the government indicates in its opposition that it would have been material to their investigation for purposes of, I think, understanding where the boxes were stored, for what period of time, and that sort of thing.

MR. IRVING: Understood, Your Honor.

But, first of all, it's almost impossible to tell what they're talking about in this colloquy. So which boxes are we talking about is -- you know, is it furniture? Personal clothes? Who cares?

I mean, the questions -- the moving of the boxes that we're talking about in Count 42 are the movements from right

after the president left the White House and went to Mar-a-Lago. So I'm sure that there was lots of stuff that went into Mar-a-Lago. I'm sure there is lots of clothing and furniture that went into Mar-a-Lago.

How could that possibly be relevant to anything? And the indictment itself explains, and so does all the discovery, you know, all of the different types of stuff that went into Mar-a-Lago, and, you know, the fact that -- the actual boxes that the government cares about were moved several times before Mr. De Oliveira was interviewed in January of 2023, two years later.

So it -- I'm having a tough time trying to figure out how whatever Mr. De Oliveira said, even assuming it's the boxes that matter, how that could possibly have been relevant or material two years later.

THE COURT: Okay. All right.

Anything further on your motion?

MR. IRVING: No, Your Honor. Thank you.

THE COURT: All right. Mr. Harbach? Mr. Bratt? Which of you will be tackling this opposition?

MR. BRATT: I will, Your Honor.

THE COURT: Okay. Thank you. And I will hear from the Special Counsel, please.

MR. BRATT: Just at the outset, I think it's important to recognize that the superseding indictment goes well beyond

the requirements of Rule 7(c) with respect to the obstruction counts, aside from tracking the statutory language. Over the course of more than 30 paragraphs, it details the conduct that the government alleges underlies those accounts -- those counts, the obstruction count and -- the conspiracy count and the obstruction count.

As to -- excuse me -- the false statement count, yes, I could also chop it up as they do in the brief, and as Mr. Irving just did here, and make it sound nonsensical, but I think the Court has caught on and recognized that the -- as it's pled in the indictment, that the questions are laid out, it is alleged that the bolded answers are false. It is alleged that they are material, and that is sufficient on the face of the indictment.

As I think the Court was indicating, a lot of the arguments that Mr. Irving is making are jury arguments. They're arguments he may make to the Court as part of a Rule 29 motion, but it does nothing to undermine the sufficiency of the charged -- the charged false statement.

THE COURT: Okay. If we could start with 33, Count 33.

MR. BRATT: Yes.

THE COURT: And then we will get to the false statement count.

MR. BRATT: Sure.

So with respect to Count 33. One -- again, I think the

Court acknowledged or steered Mr. Irving toward the fact that his argument, as to Mr. -- whether or not Mr. De Oliveira was a participant in all aspects of it is inconsistent with conspiracy law. We --

THE COURT: Well, I don't think he is taking the position that his client needs to have done every single thing listed in the manner and means. I think he is just indicating which of the options goes to him. More specifically, is it F and G, or just G?

And -- or maybe it's A, B, C, D, or E, which it doesn't appear to be the case.

MR. BRATT: Well, he has some involvement in the movement of the boxes. So that part of that also -- also refers to him.

But, again, I think the key question, both for the sufficiency of the indictment, and for the argument for a bill of particulars, is: What is in the indictment itself? What is alleged in the indictment?

You know, paragraphs 74 through 87 detail Mr. De Oliveira's conduct with respect to the obstruction that occurred as to the video footage. That is all out there for him. He has extensive discovery --

THE COURT: So can you just specify, looking at A through G, with any corresponding allegations in the remainder of the superseding indictment?

MR. BRATT: So I -- if the Court is asking me to give a bill of particulars now, I just want to be bound by what I say. So certainly G -- G -- G refers to him. He is -- or I should say he is encompassed by the allegation in G.

THE COURT: The false statement, could it be included in Count 33, given the time frame?

MR. BRATT: No, it cannot.

THE COURT: Okay. And then -- but you said "moving boxes." So that would be --

MR. BRATT: B.

THE COURT: -- B?

MR. BRATT: Correct. And G.

But, again, I -- I'm a little uncomfortable being in a position where --

THE COURT: Why would you be uncomfortable just simply identifying paragraphs in a public superseding indictment that tied in Mr. De Oliveira --

MR. BRATT: So I have, and what I just want to make sure is, you know, as we go forward, we don't know what other evidence may come about, what other witnesses may come about. So --

THE COURT: That's fair.

But standing here, looking at the four corners of the superseding indictment, I just wanted to get some clarity that it is -- that it is, in fact, G, it's not F, and that

it's -- and then it's B.

Which paragraphs would you say connect Mr. De Oliveira to the movement of boxes?

MR. BRATT: So that portion is what immediately precedes paragraph 74 to 87. I believe that begins -- part of that begins at paragraph 53. And --

THE COURT: 53. Okay.

MR. BRATT: -- he is involved in some of the -- not each of the paragraphs that follow between 53 and 74, but he is involved in those paragraphs.

THE COURT: Because I've gone through them, and I've just tried to focus in, given that this is a motion brought by Mr. De Oliveira to see which allegations are specific to him. So can you assist me with that?

MR. BRATT: So for now, or for these purposes, Your Honor, I would focus on the paragraphs in which he is named.

THE COURT: So 62, concerns the movement of approximately 30 boxes?

MR. BRATT: That's correct.

THE COURT: Okay.

MR. BRATT: And he is also involved in 63.

THE COURT: Okay. All right. Now, what is your argument on this allegation or absence of an allegation that Mr. De Oliveira knew of an official proceeding?

MR. BRATT: Well, I don't see how there is an absence of that. If you look at the statutory language, what he is being charged with having corruptly persuaded or corruptly interfered with the various formulations that are in 1512, what he is being charged with having -- having acted toward -- toward obstructing is an official proceeding.

And we cited in our opposition brief the Friske case from the Eleventh Circuit, and certainly, we have to prove that he was aware of an official proceeding. We do not have to prove, and he cites no case saying that we have to prove that he knew the details of the subpoena, that he knew what the parties' obligations are with respect to a subpoena, that he had to knew -- know what the recipient's preservation obligations were with respect to a subpoena.

What we have to show is that he had knowledge of an official proceeding, and that is encompassed in the mens rea in the obstruction counts.

THE COURT: Okay. So you agree that you have to prove per Friske or "Friske" -- I'm not sure how to say that -- that he had knowledge of a -- of an official proceeding?

MR. BRATT: That's correct.

THE COURT: Okay. But you would agree that the indictment doesn't expressly indicate that he had that knowledge, except to the extent it generally refers to the statutory language in 1512?

MR. BRATT: So it doesn't, but I also think it's important to compare this superseding indictment with the superseding indictment in the lead case that they cite in their motion, which is the Eleventh Circuit's decision in McGarity. And I'm sure the Court's familiar with McGarity.

Just to quickly summarize it. That was a wide-ranging prosecution against over a dozen people for being involved in a ring that shared hundreds of thousands of child pornographic images, and the defendants were principally convicted of engaging in a -- in a CEE.

And there was a single, one-paragraph-long count charging obstruction, and it just said that they engaged in some form of 1512 and in CEE being a continuing exploitation enterprise. And the Eleventh Circuit found that that was inadequate because under the facts of that case, there -- the case began with an Australian investigation. Then the Australians began working jointly with the FBI. And then the United Kingdom began to be involved.

And the Eleventh Circuit found that there was not sufficient notice in that indictment as to the -- as to the -- the proceeding itself that was the foundation for the obstruction counts.

By contrast here, you have paragraph 50 that talks about the narrow referral. Immediately after that, paragraphs 51 and 52 of the superseding indictment. It gives the dates,

after receipt of the referral, when the FBI began its investigation and when the grand jury began its investigation.

There is then the paragraphs that we have been referring to, as to all of the -- all of the activity that he and others engaged in in support of this conspiracy and the obstructive acts.

It cannot be any clearer what the investigation and the official proceedings were that Mr. De Oliveira is charged with having -- having obstructed. And lest there be any question remaining as to what that proceeding -- what those proceedings were, he has, through discovery, all of the information that the government's provided.

He has the two subpoenas -- and those subpoenas have been made public -- that are the foundation of the obstruction counts: The May 11th subpoena for documents with class- -- May 11, 2022, subpoena for documents bearing classification markings; and the June 24th, 2022, subpoena for video footage.

All the grand jury transcripts that he has received that span this -- this period of time, they're all from the District of Columbia grand jury.

THE COURT: So if -- if you were looking through the indictment for an allegation that Mr. De Oliveira had knowledge of the official proceeding, the grand jury that we're referring to, where would you find that?

MR. BRATT: You would find that in what I -- what I

just described, Your Honor. You would define it -- find it in, really, paragraphs 50 through 87. You would find it in the discovery that he has.

THE COURT: You are giving me broad range paragraphs.

Which allegation in this superseding indictment actually says that Mr. De Oliveira had knowledge of the official proceeding?

MR. BRATT: That is in the language in Counts 33 and the other obstruction counts. You cannot have the mens rea to obstruct an official proceeding if you don't know that there is an official proceeding.

THE COURT: So, okay, I still haven't heard where in this indictment -- I'm happy to go to whichever paragraph you direct me to.

MR. BRATT: It's paragraph 95, where we lay out the statutory language.

THE COURT: Okay. So it's the recitation of the statutory language.

MR. BRATT: Yes, yes.

THE COURT: That's it? Okay.

MR. BRATT: And you cannot read that language that -- without -- and satisfy the mens rea without having knowledge of the -- of an official proceeding.

THE COURT: Okay. Now, with respect to the term "corruptly," and this will probably come up in the other

motions set for argument today, but what is your definition of "corruptly"?

MR. BRATT: So I am going to refer to Mr. Harbach, but it's the Eleventh Circuit definition that we have previously given the Court.

THE COURT: Okay. Which is?

MR. BRATT: Which is --

THE COURT: Or I'm happy to -- if Mr. Harbach is going to cover this, then --

MR. BRATT: I don't want to mangle it. So --

THE COURT: Okay. All right. That's fine then.

Now let's turn away from Count 33 and discuss my questions earlier regarding the distinction between Counts 40 and 41. Can you -- can you answer the same question that I posed of Mr. Irving?

MR. BRATT: Well, I -- I think I can give the same answer that Mr. Irving gave. This may be a rare area where we are in agreement. It charges different prongs of 1512.

THE COURT: Factually, what's different?

MR. BRATT: Factually, it's the -- essentially, the same context -- both --

THE COURT: Okay. That's what I was curious.

MR. BRATT: -- both allegations, yes.

THE COURT: Factually, the same conduct, but just invoking different provisions of 1512.

MR. BRATT: Different ways of violating the statute.

THE COURT: Okay.

Okay. So then getting to the false statement, the final count, 42. Looking at the excerpt of the interview provided and then looking at paragraph 120, what exactly, if you had to pinpoint, is the false statement or false statements, plural?

MR. BRATT: So --

THE COURT: In other words, he said "blank," but he knew "blank" was false because why?

MR. BRATT: So it is alleged that he was asked a question -- and I should add, he knows from discovery, as he said -- they have the full transcript -- that the agents told them why they were asking these questions. That they were interested in the location movement of boxes at -- at Mar-a-Lago.

So he is first asked a question: At the end of the presidency, was he part of any group that helped move boxes or unload them when they arrived? That's the -- sort of the first, at the bottom of page 51, to the top of page 52, before the three asterisks.

THE COURT: So, just stopping there for a minute, the statement is: "I was not involved. I was not part of any group" --

MR. BRATT: "That unloaded and moved boxes" --

THE COURT: Okay.

MR. BRATT: -- "at the end of the presidency."

THE COURT: "I was not part of any group that unloaded or moved boxes."

You said, "at the end of the presidency," is that --

MR. BRATT: The question begins --

THE COURT: I don't have the full interview; so I'm just looking at the superseding indictment.

MR. BRATT: Right, right. And for purposes of the motion, that's all we -- we -- we can be looking at.

THE COURT: Right.

MR. BRATT: But, again, the question is: "When, after the end of the presidency, boxes arrived to Mar-a-Lago, were you part of any group to help" --

He interrupts, "No."

-- "and unload and move them?"

THE COURT: Okay. So stopping there.

He says: "I was not part of any group" -- allegedly. Again, these are all allegations; I should make that clear. But "that unloaded or moved boxes after the end of the presidency."

And the answer is "no."

MR. BRATT: Correct.

THE COURT: Okay. And so the falsity there is that he was, in fact, according to the Special Counsel, involved or

part of a group that moved boxes at the end of the presidency?

MR. BRATT: That's correct.

THE COURT: Okay.

MR. BRATT: And as they know from discovery, there are photographs reflecting that.

THE COURT: Of the movement?

MR. BRATT: Of him being part of the people moving the boxes, correct --

THE COURT: Okay.

MR. BRATT: -- with the boxes.

THE COURT: Now when you say "the boxes," is there any understanding of which set of boxes? I know that there is a lot of briefing about which boxes. We start with X number. It then whittles down to another number. I know in the special master litigation there was an inventory of, I believe, 33 items/boxes or containers.

In this Q and A, is there any reference to which boxes?

MR. BRATT: No. It is part of the efforts to understand the movement of the boxes. So the main resting place of the boxes that arrived from the White House at the end of Former President Trump's administration, particularly boxes that were transported on Air Force One on January 20, 2021, but other boxes --

THE COURT: Can you stop there for just one moment --

MR. BRATT: Yeah.

THE COURT: -- in the terms of the chronology? Because the indictment references that -- I just had a question about the timing. One moment. Yes. It's paragraph 4: "That as he departed the White House" --

MR. BRATT: Correct.

THE COURT: -- "caused scores of boxes" -- was -- is it alleged in this indictment that all of the boxes that are the subject of the indictment were delivered on January 20th? Or were there other delivery dates associated with the boxes?

MR. BRATT: So as a factual matter, there were other delivery dates. There were some boxes that arrived on -- in moving vans.

THE COURT: Prior to the 20th?

MR. BRATT: I'm not -- I forget exactly which day they arrived. They're all right around the 20th.

THE COURT: Okay.

Okay. So getting back to what you were mentioning earlier, we're talking now about the Q and A for Count 42 and trying to understand which boxes are the subject of that recorded interview.

MR. BRATT: Correct.

So there were boxes that arrived on January 20th, 2021. They were on Air Force One. They were unloaded at Palm Beach International Airport. They were loaded into SUVs that came from Mar-a-Lago, and they were transported to Mar-a-Lago. And

the bulk of them ended up on the stage in the White & Gold Ballroom -- of those boxes that arrived. And we allege that his answers and unawareness of those boxes were false.

THE COURT: Okay. All right. Now can you address the materiality argument?

MR. BRATT: Yes. Well, again, it is alleged that they were material. And they know from -- and part of our proof would be that when he was interviewed, he was advised as to the interest that the agents had in the subject matter about which they were questioning him.

And we can either -- the Court will give an instruction on -- on materiality, and we will either be able to meet that burden, or we won't meet that burden. Or maybe he will be able to convince you at the Rule 29 stage that we haven't met that burden. But for purposes of a motion to dismiss the indictment, what we have alleged is more than sufficient.

THE COURT: But it's correct that the arguments on materiality are reflected in your opposition at 372, page 14?

MR. BRATT: Yes.

THE COURT: Okay. Are you aware of any case law that would discuss the need to further specify why a false statement is material other than just saying it's material?

MR. BRATT: No. And, in fact -- I know you did not engage with Mr. Irving about his arguments on bill of particulars, but that is the -- the exact type of question that

the Eleventh Circuit said is not appropriate for a bill of particulars. For us to --

THE COURT: I ask only because, for example, in white collar cases, oftentimes the indictments say, "Well, it's material because if we had known about the lie, we wouldn't have paid out the money," or something along those lines.

And I'm just curious whether something comparable would be included in this type of charge.

MR. BRATT: I'm not aware of any Eleventh Circuit authority, and I haven't seen any in their briefing.

THE COURT: Okay. All right.

Anything further, Mr. Bratt?

MR. BRATT: Not unless you have questions about his specific bill of particulars request. But I think a lot of the same principles are going to come up in Mr. Nauta's argument.

THE COURT: All right. Well, then, let's just -- turning to the bill of particulars, I understand your position to be that none of the requested information is something the government would be in a position to provide in the form of a bill of particulars; is that right?

MR. BRATT: Right. And I think there are three overarching points, and this way it applies to both motions. The first is that the bill of particulars is not appropriate when an indictment, one, is very detailed, as this one is, and two, where discovery has been extensive, as it has been here.

That's really black letter --

THE COURT: But, for example, on the official proceeding, it's clear that the indictment doesn't -- other than tracking the statutory language, doesn't allege that he knew of the existence of an official proceeding. I think we've talked about how paragraph 95 is -- I would appreciate no sarcasm.

So --

MR. BRATT: I didn't --

THE COURT: Given that -- given that, what I'm trying to understand is: Because the indictment doesn't contain a specific allegation about his knowledge of the official proceeding, then why would the Special Counsel be opposed to providing a bill of particulars, at least with respect to that one discrete point, which is just governing the official proceeding?

MR. BRATT: So two things. One -- and I wasn't going to say something sarcastic; I would never do that, Your Honor.

But our argument is, if you look at the plain language, both in the statute and what we allege, "with intent to impair the object's integrity and availability for use in an official proceeding," that is alleging that he has to be aware of an official proceeding. And -- so that's the first part, that we have alleged it and we have properly alleged it.

The second part of my answer is that -- what he is

asking us to do in the bill of particulars. And when a particular -- a bill of particulars begins with why or how, he is asking us to give our theory of the case. He is asking us to set out the facts and -- both direct and circumstantial -- that support the element that we have alleged, and that is not what the law requires.

And so to answer that question, essentially would be requiring us -- and this -- this holds true for many of the questions that -- that are in Defendant Nauta's motion that Mr. Woodward has argued. For us to do that would essentially be to give, at this stage, our closing summation. It would all -- be all of our arguments, marshalling all the proof, and saying this is --

THE COURT: But would it be just focusing on the knowledge piece on the official proceeding?

MR. BRATT: Yes. There are any number of facts that we can point to that show that Mr. De Oliveira and Mr. Nauta were aware of the official proceeding. We understand that's our burden, and they have -- they have all of the -- the -- the same evidence that we have. And we look at that evidence, and we plan to make particular arguments to the jury and, at the proper stage, to the Court.

But we do not have to give those arguments now in response to a bill of particulars. That runs directly squarely in the face of what the Eleventh Circuit has held.

THE COURT: Okay. All right. Thank you.

Anything further, Mr. De Oliveira, on your particular motion?

MR. IRVING: If I may just briefly.

Your Honor, just on that -- on that last point, I understand that the law doesn't, you know -- the government quoted cases that discuss how they don't have to, you know, give up all their theories of the case and whatnot at this stage, but we are getting kind of late in the game here. If the government doesn't understand and -- and can't explain what facts there are to suggest that Mr. De Oliveira had any knowledge of an official proceeding anywhere or investigation or --

THE COURT: Well, I think they said that that they do have all of that, that it's in the discovery, and that it's part of their case. So it's in the facts; it's just not more specifically alleged beyond tracking the statutory language.

MR. IRVING: Understood, Your Honor. I -- I just -- I don't think it's too much to ask that they -- that they articulate that in a -- in a situation where -- as I said before, yes, they tracked the statutory language, but then they have this -- you know, pages and pages of rambling superseding indictment that say nowhere anything about the fact.

So I will leave that at that.

THE COURT: Do you have any authority that would

suggest that a more specific allegation of materiality is necessary, other than what's been achieved here, which is a reference to the statutory term?

MR. IRVING: Are we talking about the false statement or the --

THE COURT: The false statement, yes.

MR. IRVING: I don't know -- I don't have a case to give you at the moment.

THE COURT: Okay. All right. Then, thank you.

MR. IRVING: Thank you.

THE COURT: I think that concludes the Court's argument -- hearing of argument on your motion, Mr. Irving.

MR. IRVING: Thank you.

THE COURT: So with that, let me turn to Mr. Woodward or whoever will be addressing the two remaining motions.

MR. WOODWARD: Thank you, Your Honor.

I also just wanted to thank the Court for setting the hearing today. I didn't put in the -- in the public filing, but I don't mind saying here that we're headed home tonight and back down to Disney World tomorrow with the family. So I really appreciate both the Court and the Special Counsel's office not objecting to that request.

So two motions. But as the Court, I think, has observed, they're somewhat -- they're somewhat related, both to each other and to Mr. De Oliveira's motion. And so I will

start first with the vagueness argument because that will tie into the significance. Whether the Court grants that or whether the Court concludes -- you know, we can read the writing on the wall that this is a jury instruction issue, it will then tie into the significance of the second request.

And the vagueness argument focuses on the use of the phrase "corruptly." "Corruptly" is found in 1512 and its sister statutes. It's found throughout each of the charges that are alleged as against Mr. Nauta with respect to obstruction.

And while we appreciate -- we appreciate the Special Counsel's position that the Eleventh Circuit has at least accepted one definition of "corruptly," we take issue with the fact that this Court would be bound by Friske -- or Friske and its holding.

Frankly, vagueness wasn't the issue before the Court. And so what we have here is a term that the Special Counsel's office and this Court has required to conclude Mr. Nauta is on notice of; otherwise, we have a due process concern. And as the Court just went through in some detail, it's not clear how Mr. Nauta knew about the official proceeding that was -- that was going on, and certainly the indictment doesn't make that clear. And as a result, the use of these statutes and the use the phrase "corruptly" as applied to Mr. Nauta is unconstitutional insofar as he's not put on notice of what

"corruptly" means.

And, you know, really --

THE COURT: So, I guess, what definition do you think applies to the term "corruptly"?

MR. WOODWARD: Well, we would argue that Justice Scalia presciently addressed this issue when he opined, albeit in a concurring opinion, that -- excuse me -- in -- concurring in part and dissenting in part -- that for one to act corruptly, there must have been -- there must be proof that they had a pecuniary benefit in their actions.

And I'm citing, of course, to United States vs. Aguilar, 515US539.

THE COURT: I guess my question is: Even if you adopted, not a pecuniary test, but a benefit, you procure a benefit for yourself or someone else, wouldn't that still be alleged in this indictment because the purpose of the conspiracy, as stated in 96, alleges a purpose to help the former president keep classified documents he wanted to conceal?

MR. WOODWARD: No, because just as -- I'm going to respond to that in two ways, actually.

First, as the Special Counsel reminded me not long ago, there is only one conspiracy charge. And so all of the other uses of "corruptly" apply only to Mr. Nauta. And so what benefit did Mr. Nauta himself seek to obtain?

They've conceded that the only person benefitting from these acts was Former President Trump. Now, with respect to the conspiracy, what Justice Scalia explained is that there has to be a financial benefit. And there is no allegation in the indictment, nor is there any proof otherwise, but we're working with the indictment here, that Former President Trump stood to benefit financially from obstructing the proceeding --

THE COURT: But even the Fischer case that you cited, even that decision, assuming you agreed with the concurrence, even that concurrence, as it explains the "corruptly" element, does not require financial benefit, does it?

MR. WOODWARD: That's correct. It does not. In fact, it is the dissenting opinion in which a financial benefit is required, and it's the dissent that is referring back to Aguilar in Justice Scalia's discussion of -- and so when Your Honor says "any benefit at all," that is the concurring view.

And so what the -- I think it was Judge Walker wrote in his concurring opinion is that the benefit does not have to be financial; there just has to be a benefit. There has to be a specific benefit --

THE COURT: For yourself or for someone else?

And so that's my question, is: Why wouldn't paragraph 96 sufficiently address the "corruptly," even assuming your view of the definition is correct?

MR. WOODWARD: So paragraph 96 would address -- would -- might address "corruptly" with respect to the conspiracy charge, but it would not address it with respect to the charges as against -- no. I'm sorry, Your Honor.

"For yourself or someone else," that's not how the individual 1512 charges are laid out. It is for Mr. Nauta's benefit. And I think the Special Counsel's office recognizes -- I think they've conceded that they do not allege that Mr. Nauta stood to benefit from moving the boxes.

And so, as pleaded in the indictment, taking, again, apart -- taking -- setting aside the conspiracy charge, all of the other counts must fall because there is no benefit to Mr. Nauta under the Walker definition of "corruptly" in the Fischer decision.

And, in fact, that's why we think the Special Counsel is going to rely on the -- do you have a preference between "Friske" or "Friske"?

THE COURT: No.

MR. WOODWARD: Okay. I will go with "Friske" then.

I think that's why they're relying on that definition of "corruptly" in Friske, because it doesn't require any benefit to anyone at all. It just requires an improper motive.

And so if -- if the Court were to adopt the Walker concurrence in Fischer, then -- then the indictment has to fall. But let's take a step back --

THE COURT: It would be odd, right, to go beyond -- I mean, Friske, perhaps, didn't grapple with the definition in specific terms, but, nevertheless, laid out the elements of the cause of action and clearly states the "improper purpose" language, which is fairly customary, and then, I think, is picked up in other Eleventh Circuit cases. So it would be odd to stray from the improper purpose. And then, of course, you just pick up paragraph 96 as the alleged improper purpose.

MR. WOODWARD: Well, Your Honor, I think, respectfully, to my colleagues that defended clients in Friske and other cases, that the issue wasn't argued, doesn't mean that it wasn't an issue to be argued in those cases. I think Your Honor every day sees new arguments. That is sort of the nature of what we do.

And so, importantly, Friske does not preclude the Court from requiring more. And, again, we're getting into -- I can hear my colleague behind me saying "charging conference." We're getting into a discussion that might be more apt for a charging conference, when, really, the purpose of this motion is to make the point that there are multiple definitions of "corruptly," and as a result of the -- of multiple definitions of "corruptly," Mr. Nauta is not on notice of how his actions violated the statute. And that is why we have found ourselves in a situation where the -- those charges that require corrupt acts have to be dismissed as against Mr. Nauta. After all --

THE COURT: You're not aware, though, of any case that has actually dismissed a 1512 charge at the motion-to-dismiss stage because there are -- there is development in the law in the particular definition of the adverb "corruptly"?

MR. WOODWARD: Well, Fischer itself. Fischer itself is a dismissal of an indictment --

THE COURT: Right.

MR. WOODWARD: -- but it was appealed by the U.S. Attorney's Office.

THE COURT: Yes, but that concerned a different subsection of C, which is not involved here. Here we are dealing with an evidence impairment act, are we not? And so, although the mens rea was relevant to the D.C. Circuit in trying to understand whether that charge survived dismissal, how does that play out here where we're not dealing with anything other than an evidence impairment charge?

Does that -- in other words, we're not dealing with -- with an expansion of the actus reus, which is what is, you know, being heard by the Supreme Court in Fischer.

MR. WOODWARD: So that -- I agree that that is the -- what the Supreme Court has said that they are focused on. I disagree with the Special Counsel's office that that is what Judge Nichols, the trial judge in Fischer, was considering.

And I will also observe that Fischer is a -- is a three -- there are three defendants, three separate cases:

Fischer, Miller, and Lang. And Judge Nichols was presented with a very robust argument about the flaws in 1512. And so, while the Court is correct that 1512(c)(2), which uses the also intriguing phrase, "otherwise," and that has been the focus of significant dispute, the "corruptly" actually applies both to 1512(b) and 15 -- 1512(c)(1) and 1512(c)(2). That "corruptly" word is at -- is at the outset.

So the logic -- of course, none of this is binding on this Court. This is all, as I like to say, a far away district. But the logic is applicable here too.

And so Your Honor's question was: Am I aware of a Court granting a motion to dismiss because there is -- because there is varying interpretation of a statutory phrase?

And I want to make clear -- I said Fischer. That's not what happened in Fischer. It wasn't that the defendants in Fischer came to Judge Nichols and said, we now have this circuit split, for example.

So, no, I'm not aware of that. Candidly, I had not considered the question in that way, but I don't know that that precludes dismissal here. Because the reality is, what we have now, as we pointed out in our briefs, three different interpretations of "corruptly." And what the circuit said in -- in the -- Judge Pan said in her leading opinion is, it doesn't matter because any of these three definitions would apply to Mr. Fischer himself.

That's not true with respect to Mr. Nauta. And so, under the due -- under Mr. Nauta's due process rights, he is entitled to know which of those three definitions applies when he is indicted with these charges. And because we now cannot know that, the statute becomes vague.

THE COURT: But this confusion that you have indicated exists, doesn't really exist in the Eleventh Circuit. I mean, Friske and at least one other case pretty clearly adopts the improper purpose language, and it's fairly understood to be the definition. So why could -- why would that create such grievous ambiguity for purposes of someone trying to conform their conduct to the law?

MR. WOODWARD: Of course, we don't know why, again, defense counsel didn't -- didn't argue. Now, Friske is itself decided -- if the Court will forgive me -- in 2011; so some 13 years ago. And none of these issues had bubbled up.

And, in fact, Justice Scalia's opinion is concurring in part and dissenting in part. And so we didn't have a scenario where -- where the definition of "corruptly" was -- was varying, but that's why we have these arguments, and that's why we bring these issues to trial courts' attention because the law does change.

And Mr. Nauta is now serving as a victim to that change because he doesn't know what the definition of "corruptly" will be when the Supreme Court is finished with it.

THE COURT: Do you think there is some dispute about whether the Supreme Court will even address the mens rea component in that case? It was included in the -- in the cert petition and in the merits briefing, but it's more of a secondary, subsidiary argument. So what's your position on whether guidance is really going to come from the -- from the Court on the term "corruptly"?

MR. WOODWARD: They certainly have indicated that -- that it's not going to come. At the same token, the Supreme Court does what it wants. And it -- and it seems unlikely to me that they will ignore this "corruptly" issue. It has come -- it has presented itself in a number of ways now.

And I think, whether it's in the Fischer case -- or now that the Robertson decision has come down and called into question what the actual definition of "corruptly" is, this -- this law -- this litigation is going to continue for some time. I don't think the time --

THE COURT: But Robertson is at the end of the road, right? There is -- there is no pending litigation in that case?

MR. WOODWARD: I was going to say I don't know that the time has been exhausted for the Robertson Court -- for the Robertson defendant to seek en banc review. I don't think it has. I think that -- I think they can still seek en banc review, but I -- I won't ask the Court to quote me on that.

THE COURT: Okay.

MR. WOODWARD: And so -- and Robertson, you know, just further confuses -- again, we're not in D.C.; I appreciate that. And in the Eleventh Circuit -- the sort of plain-meaning definition of "corruptly" has been accepted, but I don't read -- we don't read Friske as requiring this Court to adopt the definition used in Friske; whereas, here, a defendant is arguing that it -- it should not, given the trend in the law with respect to "corruptly" and what a defendant need have been thinking when the alleged crimes were committed.

THE COURT: Okay. Anything further on your motion to dismiss beyond the "corruptly" definition?

MR. WOODWARD: No, Your Honor. I'm happy to transition to the boxes.

So we -- we hear the Special Counsel's office with respect to their obligation in an indictment. It is minimal. Rule 7 does not require a speaking indictment, but I do think that that's a fact of consequence in this particular case.

We have a speaking indictment. And although the -- their choice of bringing a speaking indictment does not, at this stage, change their -- their constitutional obligations, it is telling in what it does not say. Had they brought a nonspeaking indictment, had they simply alleged the elements of the offenses, we'd still be here, to be sure; we would still be here talking about a bill of particulars.

Why? Because a bill of particulars is a -- not a tool that -- that allows the Court to force the government to supersede the indictment. That's not what a bill of particulars is. Rather, a bill of particulars is a tool that allows a defendant to request, and for the Court to order the government to explain to a defendant how these charges operate.

Now, yes, the Special Counsel's office focuses on why a bill of particulars cannot serve as a discovery tool. I understand that as well. But I take issue with the way that they've characterized what is being requested here. We're not asking for closing argument in this case. We're asking for the facts that are necessary for the elements of the offenses to be proven. Nor do we think it is sufficient for the government to point us to -- I think, we're up to 1.3 million-plus pages of discovery -- and say it's in there somewhere.

So stepping back, what is the standard for a bill of particulars and what is required? It is -- the Court asked Mr. Irving early on in your colloquy: What is the pleading standard? Again, I think that's sort of a separate issue. Whether they have met the bare pleading requirements is not what we're pointing out here.

As the Eleventh Circuit observed in Anderson, quote, "a bill of particulars, properly viewed, supplements an indictment by providing the defendant with information necessary for preparation."

THE COURT: Okay. So let's get to that. What information do you think is necessary for your preparation that you don't otherwise have in the superseding indictment?

MR. WOODWARD: How did the boxes with classification markings get to the storage room?

The narrative, as told by the superseding indictment, is that we have some 60 boxes in a storage room that are reviewed by Trump Attorney 1. We also know from evidence, although not in the -- we also know from the discovery in this case, that Trump Attorney 1 says he reviewed all of the documents that were in the storage room.

We then have in the indictment a set number of boxes -- actually, now I'm going to get the numbers wrong already. Here I thought I would at least get through -- we have 60 boxes that are moved, roughly 60 boxes that are moved from the storage room to the residential area. And then we have half of that, 35 or so boxes, that are moved from -- as alleged, from the residential area to the storage room.

And so, when Trump Attorney 1 conducts the search, the allegation is not all of the boxes were available to Trump Attorney 1 when that search was conducted; those boxes were somewhere else.

We don't know if the government's -- believes that they were in the residence. We don't know if they believe they were in the office. We don't know if they believe they were in some

other location.

But what we do know is that what Mr. Nauta is charged with is concealing documents with classified -- classification markings that were not present for Trump Attorney 1's review.

What we then know is that when the FBI conducted its search of the storage room and the residence, we -- they discovered additional documents with classification markings in one of those two places; only the storage room. And so, the indictment insinuates -- and I'm ignoring the office because, to my understanding, Mr. Nauta is not alleged to have moved boxes in or around the office area, but we can -- we can come back to that.

So they're not -- no classification markings are discovered in the residence. And now, classification markings are discovered in the storage room; the insinuation being, is that they were not there when Trump Attorney 1 conducted the search of the storage room.

THE COURT: Okay. So what is missing in terms of the allegations there? It's a fairly specific, I would say, very lengthy 60-page indictment. What exactly is missing in terms of the movement of boxes? Which boxes went where at what time? Whether such boxes were the ones that contain the classified documents or not? What is missing?

MR. WOODWARD: The crime that Mr. Nauta is charged with is moving boxes that contained classification markings. And

so, the only way for Mr. Nauta to -- to be guilty of that crime is if the boxes with documents that had classification markings got put back into the storage room by Mr. Nauta. And that's not alleged. We don't know how the boxes that contained classification markings, that were in the storage room, got there so that the FBI found them when they conducted their search of Mar-a-Lago.

Because if Mr. Nauta didn't put them there, if Mr. Nauta didn't move any boxes with classification markings, he is not participating in any effort to conceal the documents with classification markings from Trump Attorney 1, the FBI --

THE COURT: But doesn't the indictment clearly allege that he did move boxes containing classified materials?

MR. WOODWARD: The indictment alleges that he moved boxes containing classified materials. We are asking how the -- what evidence there is of that fact. And a bill of particulars allows the Court to order the Special Counsel's office to tell us necessary facts to prepare our defense, and -- and we don't have those facts. They may claim that those facts are in discovery, but I don't know them; and so, I can't prepare my defense of Mr. Nauta without knowing those facts.

THE COURT: It seems like you're expanding the bill of particulars device. But just so that I understand, the specific piece of information that you're looking for, say it

one more time.

MR. WOODWARD: How did the boxes containing classification markings get to the Mar-a-Lago storage room prior to the FBI's search on August, I think, 8th -- it might be 4th, though -- in early August.

Because if Mr. Nauta did not move those boxes, then the government cannot prove that Mr. Nauta moved boxes with classification markings in an effort to conceal them from the grand jury.

THE COURT: All right. But you have a ton of discovery, presumably many witness interviews, and other statements to pore over. Wouldn't it just be the normal practice for you to look through the discovery and figure out what evidence exists to support how the boxes got to the storage room?

MR. WOODWARD: Of course. And we've done that.

THE COURT: Well, then what's the issue?

MR. WOODWARD: We don't know. There is no -- we're -- we're unaware of what evidence there is that the government is going to use to prove up this theory.

And, again, I'm -- there is, I think, a very important distinction between asking the government to give its closing argument, which we're not doing, and asking the government to identify the evidence in discovery that reveals how the boxes moved from one place to the other.

The indictment makes clear there were more boxes when the FBI conducted its search than there were when Mr. XXXXXXXX -- I'm so sorry, Judge -- when the -- Trump Attorney 1 conducted that search. That, the indictment makes clear.

What we don't understand is why. And the discovery, we submit, does not reveal that answer. And I will take that one step farther. It seems to us that the Special Counsel's office's theory on that question, and the way that they present it to the -- the District Court in D.C., and the way that they present it in their various affidavits in support of either -- search warrants, et cetera, changes.

And so when we -- when we go to the evidence that we have been provided, their theory on -- on how all of this played out is inconsistent. And it cannot be, Your Honor, that the first time Mr. Nauta and his defense counsel learn about what evidence there is to show that he moved boxes with classification markings in them is when the Special Counsel gives its opening statement. And that -- that puts on its head our ability to prepare an adequate defense for Mr. Nauta.

THE COURT: Okay. Thank you.

I've -- unless you have something further on your bill of particulars request, then I will turn it over to Mr. Harbach.

MR. WOODWARD: I don't know if Your Honor wants to

table to last this question of the grand jury disclosure or not, or if you want me to respond to the government --

THE COURT: Well, we will -- it's going to become too lengthy if we try to inject that now. So for now, we're going to stay focused on the arguments made in the motion.

Mr. Harbach.

MR. HARBACH: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HARBACH: I'm here to discuss the meaning of the word "corruptly." And I think my remarks may be -- may be a little more abbreviated than they otherwise would have, in light of some of Your Honor's questions to Mr. Nauta. But if I get to a point where I'm being redundant or it's something you already know, feel free to just move me along.

I think Your Honor hit on a couple of very important points that should be focused on at the outset.

Number 1, the Eleventh Circuit has defined the term "corruptly" as its used in 1512(c). That's in Friske. And the language, for the record is: "With an improper purpose and to engage in conduct, knowingly and dishonestly, with the specific intent to subvert, impede, or obstruct the proceeding." Period. "The Eleventh Circuit has ruled on what it means in the context of this statute."

I will go one step further, alluding to a question Your Honor asked earlier. The government is not aware of any

Court finding the word -- the definition of the word "corruptly" in the context of 1512 to be vague. And Mr. Nauta certainly cites no such case in the Eleventh Circuit or otherwise.

What he says is, "Well, the Friske court wasn't specifically entertaining whether "corruptly" was vague. And, therefore, this Court should give it limited -- limited weight in deciding what the correct standard should be here." But note the conflation there.

Mr. Nauta's brief opens with: "The correct definition of 'corruptly' is for the benefit of one's self or another" -- and he's tried to chop off that -- that last part here today. That's his first argument.

We say no. Friske says clearly what the standard is in the Eleventh Circuit. And he says, okay, well, fine, but it's vague.

What authority does he point to, to say that "corruptly" is vague? Again, certainly none in the Eleventh Circuit. He points to Fischer, but neither Fischer nor Robertson, a case he only cites in a footnote for its dissent, concluded that "corruptly" was vague.

Fischer, as Your Honor plainly understands, concerned the actus reus part of the crime and deciding whether, otherwise, as it appears between (c)(1) and (c)(2), means more stuff like documents or more stuff not like documents. That

was the issue there.

Now, it is true that Judge Pan in the lead opinion in Fischer mentions "corruptly" for the proposition that it has to do some work in the statute so that the residual clause or the omnibus clause in (c)(2), isn't in danger of being unconstitutionally overbroad.

But a couple of things to note there. One, she specifically said We're not deciding what corruptly means in this case for two reasons. One, the conduct of all of the defendants -- that the conduct of the defendants there was independently illegal and, therefore, it would have satisfied any -- any definition of corruptly. And two, she said, you know, there is this other case in the pipeline, Robertson, that is about to come down the pike in a couple of months, and the question of what corruptly means is squarely presented there, unlike here. So we're not going to entertain it.

THE COURT: In -- ultimately, in Robertson, what is the definition chosen? It's a little bit hard to find exactly what the definition ultimately adopted is.

MR. HARBACH: I had the same reaction, but I think it ultimately is not too far from what the Eleventh Circuit's definition is. Give me one second.

THE COURT: I kept looking for a sentence in the opinion like, "'Corruptly' means" -- and then I wasn't quite finding that.

MR. HARBACH: Right, right.

So one place it appears is at 367 of the opinion. And this is -- this is toward the end of where they've -- they've gone through some other cases. But in 367 it says: "Those cases confirm, moreover, that the requirement that a defendant act 'corruptly' is met by establishing that the defendant acted with a corrupt purpose or via independently corrupt means." And then quoting another case, "To say that someone corruptly endeavors to obstruct an inquiry might mean, one, that he does so with a corrupt purpose, or, two, that he does so by independently corrupt means, or both."

Give me one second.

And there is a little bit further elaboration saying --

THE COURT: So, basically, "corruptly" means acting with a corrupt purpose.

MR. HARBACH: Well, this is -- I anticipated the Court's question. There is a citation to another case that says: "Whenever the means used are not independently criminal, the jury cannot avoid considering the defendant's purpose, if it is to meaningfully determine whether the endeavor was corrupt or evil or depraved."

Again, it is definitely with reference to purpose, to be sure, which, as I said a moment ago, isn't far from the Eleventh Circuit's definition.

So what's the point? We don't believe that this course -- this Court has to fully dissect what the D.C. circuit was trying to say in Robertson. It should be enough that, A, the Eleventh Circuit has articulated a standard, and B, to the extent the Court is interested in what another circuit might have said about it, it's enough to say two things. One, that the D.C. circuit opinion is pretty close to the Eleventh Circuit in terms of what it's trying to get at, and two, it's not vague.

The Robertson court didn't determine that it was vague. The parties didn't even argue that it was vague in the appellate court, even though they had argued that below in the district court.

So, again, not trying to -- not get conflated here. Remember, we're only talking about Fischer and Robertson and that stuff because of the predicate argument that Mr. Nauta makes that the definition -- that the word "corruptly" is somehow vague. And so that's our second point with respect to those opinions. They're not -- they shouldn't be read as being inconsistent with the Eleventh Circuit. And second, neither they nor any court we have found that is concluded that "corruptly" is vague.

THE COURT: Although I think you would acknowledge, right, that -- that it's susceptible to different formulations and that there are sort of different options and that even

courts trying to define the term, frankly, have sort of struggled in articulating exactly what it means.

And so that's what we're left with. Maybe the Supreme Court provides a little bit of guidance on "corruptly," maybe it doesn't, but at the end of the day, we have Friske.

MR. HARBACH: It's -- it -- I will add one additional observation there, and it is, I think, in the very last line of our response brief where we make the point, I think, in answering the rule of lenity argument, that there are a couple Supreme Court cases that made clear that just because judges may disagree at the margins about what a certain term of art means in the law, that does not necessarily make for ambiguity, much less unconstitutional ambiguity or grievous ambiguity so that the rule of lenity is necessary.

So, you know, it's not that different from the word willfully. There is -- that's kind of a messy one too. But, again, for present purposes on this indictment, with the guiding case law from the Eleventh Circuit, there is no reason to conclude that that definition wouldn't work just fine. There is no reason to think that the cases out of D.C. that the defendant cites suggests that there is any vagueness in the term, nor is there any reason to think, for the -- the reasons Your Honor already expressed, that the Supreme Court in deciding Fischer will -- will weigh on -- in on this in a meaningful way, such that the Court can't rule on this Rule 12

motion.

THE COURT: That all makes sense.

Let me just ask you, though, hypothetically, assuming the test were that you have to procure a benefit for yourself or someone else, then do you think the allegations in the indictment still would satisfy --

MR. HARBACH: You already said it. Yes, ma'am.

THE COURT: And that's because of paragraph 96?

MR. HARBACH: That is the -- that is -- well, it's not -- paragraph 96 is the most explicit place that it's mentioned, for sure.

But the notion that these documents were attempted to -- being protected so that President Trump could keep them, I mean, that's pregnant throughout the entire indictment. So, yes, 96 is explicit about that, but we would share your skepticism of deleting, or another, or insisting that the benefit be pecuniary. There is no -- there is no basis for any of that, even if we went with this quid pro quo theory of "corruptly."

THE COURT: Is it clear to you whether the Supreme Court will or will not take up the mens rea component, if it's hard to tell?

MR. HARBACH: I will tell you what -- I will tell you what we do know. It's plainly not within the question presented to the Court. The only question --

THE COURT: Unless you view the question presented to say, well, in addressing the act as we pull and we draw from the mens rea, and in that context, you would get there; and there is a nexus, so we have to kind of address it one way or the other.

MR. HARBACH: All right. So I think this is exceedingly unlikely. The best case I could -- if I'm playing the other side, the best case I could make is the Court says, (c)(2) should be read in the broad way the government wants, but "corruptly" -- in other words, take Judge Walker's position. If the Supreme Court took Judge Walker's position, even then, the answer would be, well, that -- that might sure -- sure as heck inform the jury instruction that's given in this case, but it wouldn't mean that there is a pleading deficiency. The indictment would still be amply pled as it is --

THE COURT: The benefit being, in that case, procuring the benefit for himself or someone else. What would be the closest allegation for that in the indictment?

MR. HARBACH: It was what we just talked about a moment ago.

THE COURT: 96.

MR. HARBACH: If it's the benefit for someone else, absolutely.

And that -- again, explicit in 96, but we would argue

it's all over the indictment in terms of what was going on here, what they were trying to do.

THE COURT: Okay. All right. Let's see. So we've talked about "corruptly." Anything more on that term?

MR. HARBACH: Nothing more on "corruptly."

I will turn it over to my colleague for the -- if Your Honor has any questions for us on Mr. Nauta's bill of particulars arguments.

THE COURT: Oh, Mr. Bratt is going to handle that?

MR. HARBACH: Yes, ma'am.

THE COURT: Okay. Then we will go hear from Mr. Bratt on that, and then we will, at the end of all of this, turn back to the grand jury issue.

MR. BRATT: Thank you, Your Honor.

I will be brief because I know I have touched on some of this already. But I mentioned one overarching point with respect to bills of particular, that being that when you have a detailed indictment and extensive discovery, that a bill of particulars is generally not warranted.

The second point I want to make is that in criminal discovery, there are no interrogatories, there are no requests for admissions. And, really, what the -- the manner in which Mr. Woodward is phrasing what he wants -- and similarly, for Mr. Irving -- a question that begins with "what" or "how" is a type of interrogatory that is not in the Federal Rules of

Criminal Procedure.

And then, the third point I want to make is -- and I'm now turning to the Maurya -- or Maurya case, M-A-U-R-Y-A, which is the Eleventh Circuit's most recent discussion of bills of particular. I just want to quote from it, that they, quote, "cannot be used as a weapon to force the government into divulging its prosecution strategy. We do not allow defendants to" -- and it's now quoting from another case, Bergen -- "compel the government to" -- and I think there is a typo in the opinion -- "to a detailed exposition of its evidence or to explain the legal theories upon which it tends -- it intends to rely at trial."

And to -- to look at what Mr. Woodward and Mr. Nauta put forth as the things they want answered -- actually, on pages 4 and 5 of, now, the revised reply, ECF Number 447, it states that they, quote, "seek only particulars regarding three aspects of the case," and they then list them.

The first one is, quote, his alleged -- his, Mr. Nauta's -- alleged knowledge and participation in the charged conspiracy and his alleged participations therein.

Or put differently, he is seeking a bill of particulars -- I'm again going to quote Maurya -- or "Maurya": "That compels the government to provide the essential facts regarding the existence and formation of the conspiracy, a practice we have is explicitly forbidden."

The second thing that he asks or clarifies in the reply is Mr. Nauta's alleged knowledge that the charged conduct of moving a box to a common-access hall at Mar-a-Lago was undertaken to prevent, rather than comply with a grand jury subpoena for documents. And that really is the heart of our theory as to why, as to that aspect of the obstruction conspiracy, Mr. Nauta is -- is guilty.

And then, the third is: What, if any, alleged conduct by Mr. Nauta would make him liable for attempted obstruction or violation of any federal criminal law where he is alleged to have traveled or inspected any items that would have violated the statute charged?

And that is really seeking some sort of legal opinion from the government as to, again, a basic legal theory underlying the case.

With respect to his claim for: How did the classified documents get back to -- or get back to the storage room? To merely state how he is phrasing it is why it is an improper question or inappropriate question for a bill of particulars.

We're not conceding that we have to prove that Mr. Nauta was involved in classified documents or classification markings getting back to the storage room. Really, the gravamen of the offense with respect to the movement of the boxes is what occurred on June -- June 2, 2022, where boxes were moved, and Trump Attorney 1 did his review and

only found 38 documents. And then later, there was 70-some in the storage room --

THE COURT: So in your view, it's not material how the boxes containing classified material got to the storage room prior to August 8th?

MR. BRATT: I'm not saying it's not material. What I'm saying is that it is -- it is not an essential part of the charge against Mr. Nauta and his participation in that conspiracy.

THE COURT: Because the essential part, in your view, is?

MR. BRATT: Is the movement of boxes on June 2nd.

THE COURT: June. June 2.

MR. BRATT: And also, I would add that we're not conceding that all of the documents with classification markings made it back to the storage room. We expect there to be evidence at trial that the plane that took the former president and his family up to New York on June 3, 2022, had many boxes in it, including boxes in the restroom. And so, in many ways, we don't know all the boxes that -- that -- where were all the boxes that may have been removed of the -- of the -- the delta between the approximately 64 and the approximately 30, whether all of those actually ever made it back to the -- to the storage room.

I would also add, just on terms of the discovery --

THE COURT: And there is a lot of discovery, 1.3 million of unclassified discovery alone. So in that huge amount, is it possible to direct defense counsel a little bit more since it is so much?

MR. BRATT: Yes. So we already did that, Your Honor. In our first production to each set of defense attorneys, we had within our production -- and it was redundant of stuff that was elsewhere -- we had what we considered to be the key documents; I guess about 5,000 documents that -- that are identified as what we view as the key documents.

We also had what we viewed as the key video surveillance clips. So we have put that stuff -- we identified that for the defense attorneys with our initial productions of discovery.

Recently Mr. Woodward, Mr. Murrell, Mr. Irving, went to the FBI's Washington field office in D.C. and reviewed the boxes that were seized by the FBI --

THE COURT: Are the boxes in their original, intact form as seized?

MR. BRATT: They are, with one exception; and that is that the classified documents have been removed and placeholders have been put in the documents.

But in conjunction with their visit a couple of weeks ago, we prepared for them a chart that lists all the boxes that had classified documents in them, and which classified

documents were in which boxes.

THE COURT: So looking, for example, at that detailed property inventory in the civil case, it's unsealed at docket entry 116-1 in that proceeding, which is 22-cv-81294. This has 33 items. They're all either listed as a box/container or just documents.

I'm wondering if this list of 33 is the same 33 or 34 that are charged in the indictment. In other words, would this inventory be at all helpful to the defendants in trying to understand which boxes are alleged to be the problematic ones that were moved?

MR. BRATT: So we've already -- we've already -- again, in the summary chart that we gave them recently, we have identified, you know, the boxes that had classified documents in -- or documents with classification markings. We have identified, all right, if it's box -- and they have different -- like, triple A, or Box AA. While there were seven classified documents in there, here are the Bates -- classified Bates ranges for them. These are the markings that were on there. We have given that to them.

THE COURT: Okay. The boxes themselves are unmarked or were unmarked. And so, trying to number them and keep track of them, 1 through 33 --

MR. BRATT: The FBI --

THE COURT: -- that's a -- that's a numbering

convention that was put on after the fact, I assume?

MR. BRATT: No. There was a numbering convention that was put on, on the day of the search.

THE COURT: That's what I mean.

MR. BRATT: Yes.

THE COURT: On the day of the search.

MR. BRATT: Correct.

THE COURT: Okay. All right. Okay.

MR. BRATT: In some cases, they're letters. But there was an identification system that was put on the boxes on the day of the search.

THE COURT: All right. Okay.

MR. BRATT: So they have those. We have tried to direct them to what we believe are the key documents, key video surveillance. We have identified for them and made the boxes available to them.

We also provide a -- we provided a similar summary for the boxes at NARA. We do not have -- we have the classified documents from NARA, but we did not take custody of the boxes themselves, but they have them in discovery in digital form.

THE COURT: And is it correct that the superseding indictment does not allege that Mr. Nauta knew what was in the boxes?

MR. BRATT: I want to be careful with that because there is -- at least there -- I think it's paragraph 38.

You know, there was a time when he was in the storage room and a box spilled, and there were classified --

THE COURT: With the exception of that one.

MR. BRATT: So the indictment does not allege, other than that, that he was -- the indictment has no language in it indicating, other than that, that he saw what was in the -- saw classified documents in the boxes.

THE COURT: Okay. And that's, of course, correct for Mr. De Oliveira as well?

MR. BRATT: Correct.

THE COURT: Okay. All right. Anything further with respect to legal argument from either side before we jump into the grand jury issues, Mr. Woodward?

MR. WOODWARD: I would certainly like to be heard in response, Your Honor.

THE COURT: Okay.

MR. WOODWARD: So the -- to state the obvious, the indictment alleges that boxes with documents bearing classification markings were moved to avoid their discovery. If that's not true, if boxes bearing classification markings were not moved, then every count after 33 falls, with the exception of the false statement counts.

And so what -- what the Special Counsel's office has just explained is that we don't need to know whether the boxes that were moved on June 3rd contained documents bearing

classification markings. I just -- I can't follow that because if those boxes that were moved -- and specifically, if those boxes that were allegedly not returned don't have documents bearing classification markings, then there is no case here. There is no crime. They weren't moving boxes for the purpose of concealing the contents from anybody, because the only documents that the defendants are alleged to have concealed are those bearing classification markings.

The Special Counsel's office in the indictment makes the assumption that the classification markings that were discovered by the FBI in its search must have been among the boxes that were moved on June 3rd; but we don't know why that is.

And so I hear the Special Counsel to be making the argument that a "why" question is an interrogatory. Fine. Don't -- don't answer that question for us. Show us the evidence that, when we view, will help us understand how anyone could know that there were documents bearing classification markings that were moved on June 3rd -- or, I guess, that were not moved.

When -- taking a step back. The boxes -- the boxes are not in their original form, to be clear. I mean, that -- that is -- that is an unknown, because as the Court is well aware, there was a process involving a special master in which all of the boxes were taken and the contents were -- were at least

partially reviewed.

And so, we don't know, in looking at the evidence -- and we did go, and we looked at -- I personally didn't look at all of the boxes, but I looked at several of the boxes -- we don't know if that is the way that the boxes were kept when they were taken from the storage room. All we know is the way the boxes were kept when they were provided to the FBI, following the conclusion of the special master process.

So we don't know whether there were documents bearing classification markings in the bathroom on the plane on June 3rd. We only know that there were documents bearing classification markings in a storage room on August 8th when it was searched by the FBI.

And to our knowledge, there is isn't any evidence that shows how Mr. Nauta, Mr. De Oliveira, or anyone else would have known that this delta of boxes, this 15 boxes that is -- that is -- that are not returned to the storage room on June 2nd or June 3rd contain documents bearing classified information.

THE COURT: Well, it sounds like, you -- you know, jury arguments. But, again, I'm having a hard time seeing how this indictment doesn't give you the detail that you need. And then, I -- I take your point that the discovery is exceedingly voluminous, which I think is obvious, but the Special Counsel says that it has narrowed it and given you the more relevant documents in their mind. So I think we've sort of strayed

beyond the bill of particulars discussion, and it's really more of -- just a review of the discovery discussion.

MR. WOODWARD: Well, you know, we cite a case from the -- from D.C., granted. But United States vs. Tree (phonetic), footnote 12 on page 21, makes clear that simply pointing us to a volume of discovery isn't -- isn't sufficient.

And so, you know, the Special Counsel claims that we have given you the key "5,000 documents." I'm representing to the Court that that doesn't tell us the answer. I wouldn't be here wasting everybody's time --

THE COURT: But the answer that you're looking for -- again, I'm really trying to understand. The answer that you're looking for is the how the boxes -- and by "the boxes," do you know how many?

MR. WOODWARD: Well, when the FBI conducts its search, there are 74 boxes, I think.

THE COURT: So your ultimate question that you're looking for an answer to is, again, how did --

MR. WOODWARD: How did the boxes get in the storage room.

THE COURT: And that is so essential why?

MR. WOODWARD: Because if the -- if Mr. Nauta did not move boxes that contained classified markings, then he didn't commit the offense as alleged.

THE COURT: Okay.

MR. WOODWARD: If he is moving boxes that contain shoes and ties and -- or documents that don't contain classification markings, then he is not concealing anything from anyone.

THE COURT: All right. Okay. Anything more on "corruptly"?

MR. WOODWARD: With respect to "corruptly," I just -- I just disagree, respectfully, that the Eleventh Circuit tells us what the definition is. The Eleventh Circuit in Friske accepts what the trial court used as a definition, but nowhere in that opinion does it says [sic], "Here's how we are going to define 'corruptly' for this circuit."

And, you know, turning, then, to persuasive precedent -- precedent that we do have, you know, I think it's -- it's noteworthy to start where we always should, which is at the statute. And the statute does not define "corruptly" in the way that the Special Counsel's office is asking this Court to do it, nor does Friske. The statute simply says "whoever corruptly."

And so we are adding all these -- these meanings. When you look at Robertson, Robertson says, "Whoever acts -- one acts corruptly when they act with corrupt purpose."

THE COURT: Right, I know. But it's not unusual to have a mens rea adverb that just -- just is what it is and it's not further defined, and so jury instructions do the work and it has a little bit of a circular quality, but that's what the

law tolerates.

MR. WOODWARD: I appreciate that, Your Honor. But here, unfortunately, we don't have a corrupt purpose. We don't have an independently criminal act being committed as part of these offenses.

And so, now, the Court is left to consider what "corruptly" means in the absence of an independently corrupt act. Robertson sheds some light on that and says --

THE COURT: Well, that's okay. I think we can all review Robertson, and there is some interesting arguments to be made there. And we will see if the Supreme Court sheds any light, it's not clear, on the definition of that term.

But I think I have enough with respect to the arguments on "corruptly."

Anything further you wish to add before we turn to the final topic for today?

MR. WOODWARD: No, Your Honor. I can take a hint.

THE COURT: Okay.

MR. WOODWARD: Do you want to hear from me or from the government first on grand jury secrecy.

THE COURT: How long do the parties think this conversation will last?

MR. BRATT: I don't think it will be very long, Your Honor.

THE COURT: Okay.

MR. BRATT: May I just correct one factual thing?

THE COURT: Sure.

MR. BRATT: I think the Court is aware of this, but in the special master proceeding, the FBI did not give up custody of the boxes. Judge Dearie ordered that we copy them and provide -- copy the unclassified documents and provide them to the former counsel for Former President Trump, but the boxes have always been maintained by the FBI as they were seized.

THE COURT: Okay. Thank you. All right.

Then -- then let me hear first from -- Mr. Bratt, are you going to handle the grand jury piece?

MR. BRATT: Yes.

THE COURT: Before we get started, there is this issue about the transcript of Mr. Nauta. It was attached as an exhibit to both of the motions set for argument today. It's still sealed, per the Court's order, but I have some questions about whether it should continue to be sealed because it was quoted, at least in part, in a public opposition at 319. And there appears to be at least some agreement as to public use of certain portions.

And so I could benefit from some guidance on what it is that the parties view with respect to publication of Mr. Nauta's own grand jury transcript.

MR. BRATT: So I think, Your Honor, that Mr. Nauta stands differently from other people who testified in the grand

jury. And, in particular, as to the application of -- continuing application of Rule 6(e) to their transcripts.

Mr. Nauta has now been charged. He has his transcript, as he -- he is entitled to under Rule 16. And putting aside the restrictions in the protective order, he otherwise -- and he could have, from the day that he finished testifying, told anybody what he said on that day. So I think that he does stand apart from all of the other witnesses.

THE COURT: So it's your view that the entire transcript can be unsealed at this point as an attachment to a substantive motion?

MR. BRATT: With the same types of redactions that have been applied to his interview with the FBI. In other words, you know, to the extent --

THE COURT: Witness names?

MR. BRATT: Witness names, correct.

THE COURT: Okay. Now, in terms of -- just to understand, this -- the -- footnotes 6 and 7, I think, of the government's opposition quoted fairly heavily from one portion of that transcript.

Was there any permission needed in order to cite grand jury material?

MR. BRATT: We've received, with respect to Mr. Nauta, the necessary permission that we -- that's required.

THE COURT: Okay. So I'm unclear about what -- what's

going on in the background, because all of a sudden, I see quotations from grand jury transcripts in public filings, and there is really no context provided for how it is that the Special Counsel is just at liberty to do that.

MR. BRATT: We believe what we did was consistent with what our continuing obligations are in D.C. and the authorities we have been given by the Court in D.C. to make things available. And --

THE COURT: I have seen one petition.

MR. BRATT: Right.

THE COURT: And, of course, we will speak in general terms. But that one does not cover Mr. Nauta's grand jury transcript. And so, again, it's just very ambiguous what it is that's going on in the background and how it is that these permissions are being granted. And, of course, there is no visibility from this District Court's perspective.

MR. BRATT: So our view is that Mr. Nauta's transcript, again, with the appropriate redactions, can now be made public.

THE COURT: And that is because there is an order that exists authorizing, or because it's -- for the reasons you said earlier?

MR. BRATT: It's more for the reasons I said earlier.

THE COURT: But is there an order authorizing the use of that transcript in a -- in connection with the judicial proceeding, let's say?

MR. BRATT: So I would have to go back and check with respect to that particular transcript, but there may not be an order directly addressing it.

THE COURT: Okay. So, then, let's step back for a minute and just, to the extent you're able in open court, to describe for me what is going on with respect to the grand jury proceedings. There has been a request recently made by Mr. Woodward to transfer any outstanding grand jury proceedings relevant to this particular investigation to this Court; and, again, it's very opaque.

MR. BRATT: So, one, we provided in discovery everything that we think is discoverable that arose out of any proceedings that were in the District of Columbia. And we've received authorization to do that.

There are certain aspects, and I will just speak in very broad terms, as to what Mr. Woodward is now seeking be disclosed. The Court entered an order, I think, yesterday, that responses to Mr. Woodward's petition are due on the 22nd, and we will file our response then.

We have had to get permission for a couple of proceedings before this Court to transfer -- or to disclose things. One was related to the Garcia hearings. One was related to a sealed matter that the Court has. That is pretty much the universe of --

THE COURT: But it seems like we're at the juncture now

where it would be incumbent upon Special Counsel to, at least in a sealed capacity, inform this Court of, okay, what are the grand jury proceedings that are relevant to this case, and what petitions for use have been filed. What orders are authorizing the use?

It's just -- it's just -- it's impossible to really know. And that's -- that's what I'm struggling with. Obviously, the only issue now is -- for today's hearing was the transcript of Mr. Nauta; I think that one is easier to handle. But there are other items that may be implicated with these continuing grand jury secrecy, and I just want to get to the bottom of it.

MR. BRATT: So we don't think there's anything else that remains in the District of Columbia that is discoverable or needs to be brought to any Court's attention.

THE COURT: Is there any pending grand jury matter related to this particular investigation?

MR. BRATT: No.

THE COURT: So what's the Special Counsel's view on continued secrecy for any of those items, given the closure of that investigation?

MR. BRATT: So under both -- well, particularly Fifth Circuit law, which now -- which predates 1980 -- there was a case that we cited in one of our pleadings -- I don't have the name of it at the top of my head. But the Fifth Circuit has

ruled that -- or previously ruled that grand jury material remains subject to Rule 6(e). If it -- materials, obviously, that come out at trial no longer have the 6(e) protection. But if there are other 6(e) materials that are never used at trial, they're never made public, they remain subject to 6(e).

THE COURT: So what if a defendant wants to rely on grand jury materials in support of a substantive 12(b) motion? Then what standard -- what legal standard applies to that in the context of a closed grand jury, like we have here?

MR. BRATT: So, again, a closed grand jury remains secret. I know there was a decision in the last couple of years from the D.C. circuit, and I think it's consistent with the decision in the Eleventh Circuit, that even for a closed grand jury proceeding, a Court -- and that was where a District Court -- one of the District Court judges wanted to release grand jury material, and that was appealed to the D.C. circuit, and said, no, even if it's a closed proceeding, Rule 6(e) still governs.

So our position is if the --

THE COURT: But if a defendant wants to rely on that material in support of a substantive 12(b) motion in a judicial proceeding, then how does the analysis change, if it does, in the context of a closed grand jury?

MR. BRATT: So I think that can be at -- a sealed exhibit to the substantive Rule 12(b) motion. But, again, I

don't think the courts differentiate between an open and a closed grand jury. There are -- there is more sensitivity in an open grand -- in an open grand jury, and certainly -- and certainly that has to be protected because that can interfere with the investigation. But the other reasons that 6(e) material remains nonpublic, which is privacy of the witnesses, reputational damage to people who are in charge, those -- those concerns continue whether it's an open grand jury or a closed the grand jury.

THE COURT: But if the materials that are wanting to be used in support of a 12(b) motion don't have the privacy implications, and we're not dealing with an ongoing investigation or jeopardizing informants or any of those other things that would traditionally be thought of as continued secrecy, then what are we left with?

MR. BRATT: So I go to the line of cases that if it -- certainly, right, if a witness is up on the stand, defense has the witness's grand jury transcripts, the witness has said something different, full ability to cross-examine and impeach the witness on the stand with the grand jury material. That material is now in the public realm and is not protected by 6(e).

Other materials -- and similarly, you know, any witness who appears before the grand jury could stand on the courthouse steps and say, "I was just in the grand jury. This is what I

said." So that, obviously, you know, is also a way in which grand jury material can come out.

But at least my understanding of the law of 6(e) is that unless it comes out in that sort of fashion, or unless it comes out at trial, it remains subject to the 6(e) protections.

THE COURT: So if you were to apply, let's say, the First Amendment standard to these documents, you would then say, presumably, the compelling government interest is just, generally, Rule 6(e) secrecy, and that permits the full-blown sealing of any grand jury transcript or quotation; is that right?

MR. BRATT: That's correct.

THE COURT: Now, as far as the other pretrial motions, just trying to sort through, what grand jury material exists in this case that would be attached in support of these motions?

I know we have Mr. Nauta's grand jury transcript. We have some judicial orders, correct me if I'm wrong, with respect to an attorney-client privilege issue.

MR. BRATT: Correct. And there is -- there are -- there are the exhibits that were produced in conjunction with that order.

THE COURT: So there still needs to be a hearing now, in this district, with respect to use or reference to those particular exhibits for that one motion, yes?

MR. BRATT: Right. And that has now been transferred

to Your Honor for the disclosure of that.

THE COURT: For that one motion.

MR. BRATT: Yes.

THE COURT: Any other grand jury things that are floating around, as far as attachments to substantive motions?

MR. BRATT: May I have a moment, Your Honor?

THE COURT: Yes.

MR. BRATT: I don't think so, but we will verify that.

THE COURT: Okay. Yes, I think it would help the Court to have, like, a status report under seal of exactly, sort of, what is the lay of the land on grand jury materials as used in this proceeding and any pending grand jury petitions for use of that material in this proceeding. Because all I have been presented with is that one single petition for one motion containing exhibits that, of course, were not Mr. Nauta's deposition and may not cover any other items to be used in this case.

MR. BRATT: Correct.

THE COURT: So -- okay.

MR. BRATT: I think that's the -- the primary thing that remains.

THE COURT: But net-net, you don't have an objection to full-blown unsealing of Mr. Nauta's transcript, with the exception of the witness names other than his own; right?

MR. BRATT: That's correct. Yes.

THE COURT: Okay. All right. Then I think I have covered that.

Mr. Woodward, anything on grand jury issues?

MR. WOODWARD: So, briefly, Your Honor. Because I think we're as confused as the Court is on how these proceedings have played out. You know, Rule 6 does not authorize the government, writ large, here in the Special Counsel's office to disclose grand jury materials, yet we have a significant amount of grand jury materials in discovery in this case.

And so, I think the Court really asked a prescient question: How is it that the government was authorized to disclose to the defendants in this case, the grand jury materials?

I will tell you that in the -- in the District, the practice is, concomitantly, with the entry of a protective order, there is also a Rule 6(e) order in which the District Court presiding over a matter authorizes the government to disclose Rule 6 materials.

My understanding is that the practice in this Court is that, you know, defendants actually don't get the grand jury materials as early on as we did, and that they're often treated, instead, as Jencks, and produced much closer to trial.

The protective order in this case does not specifically address grand jury materials. So instead, what we have are

materials covered by Rule 6, which on its face precludes the government from disclosing those materials, and no order explaining why all of these materials have been produced to us.

Now, as the Court mentioned, as I have noted in our filing this week, we have petitioned the District Court in D.C. to transfer -- well, first, to disclose to Your Honor all of the proceedings with which we're aware. We had -- we had made a broader request for our -- our motion to be -- and I'm going to -- I'll go back to the court today. I'm sorry. It's just been a week. But I'm going to ask the Court for leave to share the motion with Your Honor so you can see what specifically we have asked to do.

We asked the District Court in D.C. to docket that motion in every grand jury matter that pertained to the investigation of Former President Trump; and they respectfully declined to do that. I'm not terribly surprised, as Your Honor will appreciate.

But, you know, we don't know what we don't know. And so if what we're hearing from the Special Counsel's office today is that there was some proceeding authorizing them to disclose Mr. Nauta's grand jury transcript, why don't we know about that?

I mean, Rule -- Rule 6(e) also very specifically gives the party whom the transcripts relate to, or the party to the proceeding, an opportunity to weigh in. And -- and we weren't

asked to weigh in on the disclosure of Mr. Nauta's transcript.

Now, with respect to the question at hand on whether, under Eleventh Circuit precedent, there is a reason for the Court to continue the sealing of Mr. Nauta's transcript -- we don't think so. I mean, frankly, candidly, I'm not thrilled about the idea of Mr. Nauta's transcript being on the public docket. There was all sorts of press this morning about the -- about his FBI interview transcript. But that is what it is. I mean, the First Amendment is the First Amendment, and we don't feel -- you know, I don't have a case to cite for you that says, here is the imperative for keeping Mr. Nauta's transcript sealed.

And the only other thing we will observe -- and we appreciate the Court's time and attention on this -- is that it's a -- filing has become complicated because of the way that the discovery was handled. And so, you know, the idea that we have to seek the Special Counsel's permission or leave of court in order to reference any of this stuff, it's a huge burden on us. And so, for that reason, I'm not disappointed that -- that Mr. Nauta's transcript will be unsealed.

THE COURT: Okay. So just to summarize and simplify, we all are on the same page, as far as I can tell, that the transcript should be made public in accordance with the witness name redaction rule, with any appropriate substitutions.

I will order, though, a status update to be filed by

the government under seal in a non-ex-parte fashion, just explaining to the Court what, if anything, is outstanding in the nature of grand jury materials in this case.

And then, Mr. Woodward, you should also file under seal the petition that you filed on April 10th, and you don't have to file a separate motion for leave to do so under seal; I will just authorize that now.

MR. WOODWARD: Thank you.

Your Honor, I do think one more request we would make is that under Rule 6 -- under -- under Rule 6, Mr. Nauta's grand jury transcript -- well, no, I think we're good. I'm sorry.

THE COURT: If you think of it in the next 30 seconds, let me know. Okay.

MR. WOODWARD: Thank you, Your Honor.

MR. HARBACH: Your Honor?

THE COURT: Yes.

MR. HARBACH: May I ask a question about what you just said?

THE COURT: Yes.

MR. HARBACH: In Your Honor's order directing us to provide a status report to Your Honor, you said: What is outstanding in the nature of grand jury materials?

I have in my notes from what you said a few minutes ago, two parts to that: 1, Grand jury materials that are

already in this proceeding; and then, 2 --

THE COURT: That have been submitted in discovery in this proceeding --

MR. HARBACH: Yes, Your Honor.

THE COURT: -- or attached to a substantive motion in this proceeding.

Okay.

MR. HARBACH: Okay. And then, I -- please forgive me if I misheard you, but I thought you also said you wanted to be advised about any pending petitions for materials to be used in this proceeding. Is that right?

THE COURT: Yes. Is there an issue with that?

MR. HARBACH: No. No. I just wanted to make sure I understood Your Honor.

THE COURT: And then I should add also, just in terms of the question about any order that might have existed previously that would have authorized the use of Mr. Nauta's grand jury transcript in this case, because, again, that came as somewhat of a surprise.

MR. HARBACH: Understood.

THE COURT: Okay.

MR. HARBACH: And, I -- you know, it also occurs to me that to the extent Mr. Woodward has any heartburn about Mr. Nauta's grand jury transcript, he is free to withdraw it. We didn't -- we didn't seek to put it on the public record,

they did. So if there is issue with it, he can withdraw it, and we won't object.

THE COURT: That's -- that's a fair point.

Mr. Woodward, do you wish to withdraw the transcript?

MR. WOODWARD: No, Your Honor.

THE COURT: Okay. Then the motion will stay as it has been filed.

I do want to make just one broad formatting point for all filing parties, to please ensure that everything is double-spaced and 12 point font.

Mr. Woodward, you have not been very strict with that. So let's just make sure that all future filings are in that double-spaced format.

MR. WOODWARD: Your Honor, I have -- I saw that, and so I corrected the font when I filed the motion.

THE COURT: Yes, I noticed that.

MR. WOODWARD: Yeah. I'm sorry about that.

THE COURT: All right. Okay. Thank you. That's all we have. That was the agenda for today, and we've gotten through it in about two hours. So thank you all for being here. I have nothing further. Have a nice weekend. The Court is in recess.

(These proceedings concluded at 4:06 p.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

DATE: 04-15-2024

/s/Laura Melton
LAURA E. MELTON, RMR, CRR, FPR
Official Court Reporter
United States District Court
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